

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.**

In the Matter of)	
NATIONWIDE PROGRAMMATIC)	
AGREEMENT REGARDING THE)	WT Docket No. 03-128
SECTION 106 NATIONAL HISTORIC)	
PRESERVATION ACT REVIEW PROCESS)	

To the Commission:

**REPLY COMMENTS OF THE
CHEYENNE RIVER SIOUX TRIBE
TELEPHONE AUTHORITY**

Pursuant to the notice of proposed rulemaking entitled Nationwide Programmatic Agreement, 68 Fed. Reg. 40,876 (2003) ("Agreement"), the Cheyenne River Sioux Tribe Telephone Authority ("Telephone Authority") submits the following reply comments. The Telephone Authority timely submits these reply comments by September 8, 2003. 68 Fed. Reg. at 40,876.

As a preliminary matter, it is important to note that the Commission did not consult with the Telephone Authority in the process of drafting the proposed Agreement. Prior to the implementation of any such proposal which could adversely affect resources of cultural, religious, historical and other importance to the Telephone Authority and the Cheyenne River Sioux Tribe, the Commission should engage in government-to-government consultations with the Telephone Authority and the Cheyenne River Sioux Tribe. *Accord* Comments of the United South and Eastern Tribe, Inc. at 19 (Aug. 8, 2003) ("USET Comments"); Navajo Nation Historic

Preservation Department Comments on WT Docket No. 03-128 at 1 (Aug. 8, 2003) (“Navajo Comments”).

As stated in its comments submitted on August 8, 2003, the Telephone Authority does not believe that the adoption of an agreement that in specific circumstances exempts the Commission from the requirement under the National Historic Preservation Act, 16 U.S.C. § 470a(d)(6)(B), that it consult with Indian tribes who may be affected by the location of transmission towers is consistent with the United States’ obligation to consult with Indian tribes on a government-to-government basis regarding federal actions that affect Indian tribes. The National Historic Preservation Act requires the Commission to “consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance” to properties that might be affected the Commission’s undertaking. 16 U.S.C. § 470a(d)(6)(B). The Commission also has an obligation to consult on a government-to-government basis with the Indian tribes who will be affected by the Commission’s actions. *See* Establishing a Government-to-Government Relationship with Indian Tribes, Policy Statement, 16 FCC Rcd 4078, 4080 (2000), cited in, 68 Fed. Reg. at 40,877. *See also* Comments of Confederated Tribes of the Umatilla Indian Reservation at 1 (Aug. 7, 2003) (“the FCC has the obligation to consult with the [tribe].”) (“Umatilla Comments”); Comments of Mississippi Band of Choctaw Indians at 2 (“The law with regard to tribal consultation is clear and provides for no exceptions”) (“Choctaw Comments”).¹

¹Various other federal mandates require government-to-government consultation between the United States and Indian tribes affected by its actions. USET Comments at 6 (citing

Because the same government-to-government consultation obligation does not bind those companies and entities wishing to erect transmission towers, in the absence of consultation between the Commission and an affected Indian tribe, there will be none. *See* Joint Comments of Western Wireless Corporation and T-Mobile, Inc. at 4-5 (Aug. 8, 2003) (advocating an automatic end to Section 106 review if an affected Indian tribe does not act within a strict timeline, thereby negating consultation) (“Western Wireless Comments”). Indeed, it is questionable whether the Commission can delegate its consultation obligations to applicants for tower licenses. USET Comments at 19 (“Applicants cannot act *on behalf of* the FCC with regard to the FCC.s [sic] obligations to consult with Indian Tribes.”); Navajo Comments at 1 (“The 16th Whereas’ [sic] asserts that the FCC is not delegating its responsibility to consult with Indian tribes, but the body of the [Agreement] is not consistent with this assertion.”). *Cf.* Umatilla Comments at 1 (“The license applicant will lack this [consultation] expertise.”). *Contra* Western Wireless Comments (advocating that license applicants make determination whether tower location will adversely affect tribal interests). Further, because each culturally, religiously, historically or otherwise significant site is unique and each affected Indian tribe is unique, there can be no blanket exception to the consultation rule that can adequately address each such site and the impact of tower location on such site on each affected Indian tribe. Umatilla Comments at 2 (blanket

Executive Order No. 13007 (May 24, 1996) (federal agencies must provide Indian tribes with access to sacred sites, protect those sites, and maintain their confidentiality); Executive Order of Apr. 29, 1994 (directing federal agencies to develop procedures to carry out government-to-government consultation with Indian tribes); Executive Order No. 13175 (Nov. 6, 2000) (directing federal officials to collaborate with Indian tribal officials in the development of federal policies with tribal implications)).

exemptions are not acceptable, and the Commission should “err on the side of caution and insure that the resources are protected” by consulting on each proposed tower location); USET Comments at 18.

Accordingly, the Telephone Authority disagrees with the basic premise of the Agreement that the activities listed in § III(A)(1)-(6) of the Agreement related to tower location should be exempted from consultation requirements. The Commission’s rule should be the reverse from what is proposed in § III(A): the Commission should review each application for location of a transmission tower unless all affected Indian tribes agree that the Commission need not review it. *Accord* Navajo Comments at 2. This approach will preserve the government-to-government relationship between the Commission and the affected Indian tribe with respect to such sites. *See* Umatilla Comments at 1 (“one of the strongest justifications for the obligation of the FCC itself to consult is that, over time, the agency will develop an expertise in knowing who to consult and when.”).

The Telephone Authority believes that Alternative B, set forth on pages A-14 to A-15 of the Agreement, represents a better approach to ensuring that the Commission carry out its obligation to consult with Indian tribes on a government-to-government basis, and as required by the National Historic Preservation Act. Alternative B affirms the Commission’s consultation obligations, and only allows the Commission to avoid consultation where a license applicant “has secured a letter of certification from that Indian tribe or NHO stating that such consultation is unnecessary” Agreement at A-15 (alternative § IV(C)). Alternative B thus recognizes that

government-to-government consultation between the Commission and affected Indian tribe is paramount, and only the affected Indian tribe can make a determination that consultation is not needed in a particular situation. Alternative B also recognizes the unique character of each proposed tower site, requiring a separate certification that no consultation is required for each site. However, the Telephone Authority stresses that to the extent the Commission wishes to identify time frames for decision-making by tribes, Agreement at A-15, those time frames should be sufficiently liberal to allow for tribal governmental review and approval of recommendations by the Tribal Historic Preservation Officer or other responsible tribal official. *Contra* Western Wireless Comments at 4-8 (seeking inappropriate strict time deadlines for tribal responses which may not be sufficient for tribal governmental participation and/or approval).

In this regard, the Telephone Authority disagrees with the Joint Comments of Western Wireless Corporation and T-Mobile, which advocate an even broader exception to the consultation requirements of the National Historic Preservation Act, Commission policy, and other federal requirements. Western Wireless' and T-Mobile's position may be summarized by their comment: "Excluded undertakings should never require Commission or SHPO consultation or the application of subjective tests." Western Wireless Comments at 11. This extreme position ignores the fact that the federal government has a unique obligation to Indian tribes which requires consultation on all federal actions which may affect tribal interests. The Commission should reject this statement because there should be no excluded undertakings because of the

unique qualities of each proposed tower location site, or existing reconstruction site, and the tribal interests in that site.

In conclusion, the Telephone Authority disagrees with blanket consultation exemptions for tower location sites that may have cultural, religious, historic and other significance to Indian tribes. Rather than identifying a list of proposed exemptions, most of which are based upon arbitrary determinations, the Telephone Authority believes the Commission should adopt a rule that affirms its obligation to consult on a government-to-government basis with all affected Indian tribes in determining whether to grant a license to locate a transmission tower, and in turn allows the Indian tribes to determine in their sole discretion whether consultation with the Commission may be forgone in a particular situation.

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Respectfully submitted,

Alice E. Walker
Greene, Meyer & McElroy, P.C.
1007 Pearl Street, No. 220
Boulder, Colorado 80302
(303) 442-2021

*Attorneys for the Cheyenne River Sioux
Tribe Telephone Authority*

By: Alice E. Walker
Alice E. Walker